

IT 95-76

Tax Type: INCOME TAX

Issue: Income Earned in Illinois/Individual Residency

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS

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THE DEPARTMENT OF REVENUE           )   Docket No.
OF THE STATE OF ILLINOIS           )   SSN
      v.                             )
XXXXXX                             )   John E. White,
      Taxpayer                       )   Administrative Law Judge
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RECOMMENDATION FOR DISPOSITION

SYNOPSIS: This matter is before the Department of Revenue's ("Department's") Office of Administrative Hearings as the result of XXXXX's response to a Notice of Deficiency ("NOD"). The basis of the NOD was the Department's determination that taxpayer1 failed to report to the Department a final federal change in adjusted gross income for the taxable year ending 12/31/90. At issue is whether the tax proposed to be assessed against taxpayer was discharged in bankruptcy.

FINDINGS OF FACT:

1. On 4/8/94, the Department issued a Notice of Proposed Changes to Income to taxpayer based on adjustments made to taxpayer's federal adjusted gross income for the taxable year ending 12/31/90. See Dept. File Ex. No. 1.
2. On 11/10/94 the Department issued a Notice of Deficiency to taxpayer based on adjustments made to taxpayer's federal adjusted gross income for the taxable year ending 12/31/90. See Dept. Ex. No. 2.
3. On or about 12/12/94, taxpayer responded to the NOD, the substance of which consisted of the sentence, "We do not agree." See Dept. File Ex. No. 3.
4. Taxpayer did not request a hearing. Id.
5. Taxpayer informed the Department that a chapter 7 bankruptcy

petition, case number 95B00772, was filed in which the taxes assessed were included. See Dept. File Ex. No. 4.

6. Taxpayer never filed an amended income tax return to report the feeral change in adjusted gross income for tax year ending 12/31/90.

CONCLUSIONS OF LAW: Pursuant to 904(a) of the IITA, a Notice of Deficiency is prima facie evidence of the correctness of the amount of tax and penalties due. 35 ILCS 5/904(a). Any person required to file an Illinois income tax return is required to notify the Department, within the time frame set by statute, of any final federal change which affects the computation of such person's base income. 35 ILCS 5/506(b). In this matter, taxpayer failed to present any evidence to rebut the prima facie evidence of the Department.

With regard to whether the Department is preempted from making an administrative determination regarding the NOD issued against taxpayer here, 362 (the automatic stay provision) of the Bankruptcy Act was amended by Congress in 1994. See Pub.L. 103-394, effective October 22, 1994. As amended, 362(b)(9) of the Bankruptcy Act now provides:

(b) The filing of a petition under section 301, 302, or 303 of this title ... does not operate as a stay -

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(9) under section (a), of -

- (A) an audit by a governmental unit to determine tax liability;
- (B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;
- (C) a demand for tax returns;
- (D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

11 U.S.C.A. 362(b)(9)(Supp. 1995). Pursuant to the amendment to the Bankruptcy Act, the Department was authorized to proceed to hearing here, since the taxpayer's petition was filed after the effective date of the

amendment.

Even if this matter were stayed, however, the tax proposed here represents a debt that is nondischargeable in bankruptcy. 11 U.S.C. 523(a)(1)(B)(i)(1989). On this point, both federal bankruptcy and Illinois courts are settled. In re Cohn, 96 B.R. 827 (Bkrtcy. N.D. Ill. 1988); Rosenfeld v. Department of Revenue, 205 Ill. App. 3d 427, 430 ((1st Dist. 1990) (citing In re Haywood, 62 B.R. 482 (Bkrtcy. N.D. Ill. 1986))). The tax proposed by the Department's NOD is based on taxpayer's failure to file amended Illinois income tax returns, which are required to be filed pursuant to 35 ILCS 5/506(b), in order to report the federal changes to taxpayer's adjusted gross income. In re Cohn, 96 B.R. at 828. The failure to file tax returns required to be filed renders nondischargeable the tax debt incurred as a result of that failure. 11 U.S.C. 523(a)(1)(B)(i)(1989); In re Cohn, 96 B.R. at 827 ("Section 523 excepts from discharge any debt ... for a tax ... with respect to which a return, if required ... was not filed"). The Department's Notice of Proposed Changes gave taxpayer actual notice of his obligation to file an amended return, and there is no evidence contained in the record that the amended return was filed by taxpayer. Accordingly, I conclude that taxpayer is liable for the tax proposed in the NOD.

In addition, the NOD proposed the assessment of a penalty for Taxpayer's failure to pay the entire tax liability by the due date. 35 ILCS 5/1005. Penalties imposed under that provision, however, shall not apply if the failure to pay the tax when due was due to reasonable cause. 35 ILCS 735/3-8. The existence of reasonable cause justifying abatement of a penalty is a factual determination that can only be decided on a case by case basis. See Rorabaugh v. United States, 611 F.2d 211 (7th Cir. 1979); Dumont Ventilation Co. v. Dept. of Revenue, 99 Ill. App. 3d 263 (3d Dist. 1987). Here, taxpayer failed to tender any evidence showing reasonable

cause for his failure to report the change or pay the tax. I, therefore, recommend that the Director finalize the Notice of Deficiency as issued.

Administrative Law Judge

Date Entered

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1. Although this matter is captioned under the names of the joint filers of the Illinois 1040 income tax return, I shall refer to the taxpayers throughout this decision using the third person singular.